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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 1234

CATALDO CALEGRO DELUTRO,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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IN THE

Supreme Court of the United States

October Term, 1970

No.

CATALDO CALEGRO DELUTRO,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner, Cataldo Calegro Delutro, respectfully prays that this Court issue a Writ of Certiorari to the United States Court of Appeals for the Second Circuit to review the order of that Court which affirmed the judgment of the United States District Court for the Southern District of New York, convicting the Petitioner of violating 18 U.S.C. § 894 (federal loansharking statute) and the Hobbs Act, 18 U.S.C. § 1951 after trial before Palmieri, D.J. and a jury.

Opinion Below

The opinion of the Second Circuit is reprinted in the appendix hereto.

Jurisdiction

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). The Court of Appeals, Second Circuit denied a motion for rehearing and for a rehearing en banc on January 5, 1971, but stayed the mandate of the Court pending Certiorari. (See, Appendix hereto).

Questions Presented

1—Whether 18 U.S.C. §§ 894 and 891 (Federal Loansharking) are constitutional (*United States* v. *Perez,* 426 F.2d 1073 (2 Cir.) *Cert. Granted* 39 U.S.L.W. 3214 (Nov. 13, 1970)?

2—Whether the Petitioner's Constitutional rights under the Fourth, Fifth and Sixth Amendments were violated by the use of an eavesdropping device to record his conversation with the alleged victim, without his knowledge and without any Court order therefor? (*United States* v. *White,* 405 F.2d 838 (7 Cir.), *Cert. Granted,* 394 U.S. 957 (1969).

3—Whether Petitioner's constitutional rights to a fair trial were denied by the fact that his conviction was based solely upon an unauthorized electronic eavesdrop and the impeaching testimony of the F.B.I. The sole alleged victim called by the Government categorically denied that the crime had been committed and exculpated the petitioner.

4—Whether the rule of *Costello* v. *United States,* permitting indictment solely based on hearsay, should be extended to trials? There is no "evidence in chief" herein, except an unsworn tape and hearsay. The sole government witness-in-chief testified that no crime was ever committed.

Constitutional and Statutory Provisions Involved

The Fourth, Fifth and Sixth Amendments to the United States Constitution and 18 U.S.C. § 894.

Statement of the Case

Preliminarily, it should be noted that at least *two of the issues squarely presented by this case,* i.e., the constitutionality of 18 U.S.C. 894 and the surreptitious use of an unauthorized ex parte electronic listening device to record Petitioner's conversations with the alleged victim, *are already before the Supreme Court and undecided.*

The opinion of the Circuit Court itself recognized that the evidence was woefully "thin", but nonetheless it held that a jury could have reached a determination of guilt under the peculiar theory of the prosecution. (Slip opinion below p. 770) [Appendix *infra*, 4a]

The indictment claimed that L. B. and M. B. Horowitz were the victims of the crimes charged. Both were partners in a fur business and had known the appellant for some time. DeLutro was a money lender charging usurious interest. He was a man of little formal schooling and thus "four letter words" were an integral part of his limited vocabulary.

DeLutro loaned money to the Horowitzes and the F.B.I., without a complaint from the alleged victims, found out about it and prevailed upon the Horowitzes to let them plant a clandestine microphone in their office and thus record conversations between DeLutro and the Horowitzes.

An agent of the F.B.I. encouraged the Horowitzes to try to "inflame" DeLutro by saying he would not be paid back the money he had loaned to them (A 206; 84-88; 95-6).*

No overt threats were made and only by implication or insinuation could any threat be deemed to have been uttered by Appellant (174).

Only L. B. Horowitz was called to the stand and he denied categorically that any threat was ever made to him by Appellant and further denied that he had ever told the FBI that he had been threatened.

Thus the sole evidence against DeLutro was the tape recording which was a conversation between DeLutro and L. B. Horowitz who was unwillingly playing out a scenario in effect written for him by the FBI, unbeknown to DeLutro.

The F.B.I. agents, three, said in rebuttal "impeachment" that L. B. Horowitz had told them that he had been threatened and was in fear of Appellant. Yet, they admitted that they did not make an arrest of DeLutro until long after the May 12, 1969 recorded conversation. In fact they gave no protection to the Horowitzes and no protection was requested. DeLutro was permitted to visit them everal times after this allegedly threatening conversation (160-2; 279; 301; 251).

M. B. Horowitz, a named victim in the indictment, was never called as a witness and the trial court refused to charge that this could give rise to an inference against the Government, i.e., that the testimony would therefore have been unfavorable.

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* Numerals in parentheses refer to pages of the Appendix.

In short there is *no "victim"* in this case. The trial Court even noted:

> "L. B. Horowitz, I suggest to you, is a man of unusual intelligence and he was an alert and composed witness on the stand despite his advanced age . . ." (343)

The Court correctly summarized L. B. Horowitz' testimony about DeLutro as follows (352):

> "L. B. Horowitz said . . . that the defendant DeLutro had been helpful to him, that the defendant had treated him as a gentlemen, and that he, Horowitz, was not affected by any of the four-letter words that were used and that *Horowitz did not fear him either then or now."*

Excerpts of colloquies with the Court are also indicative of the Court's own persistent doubts about the sufficiency of this case:

> "The Court:
>
> ". . . the *charge* against this man [DeLutro] was *made prematurely and unwisely,* on the basis of insufficient evidence." (173)
>
> "Your attack is *not really an attack on his credibility.* Your attack is a broadside attack upon the judgment which led to bringing this prosecution in the first place. . . .
>
> This was the *best they could get, so they put in a half-cooked case."* (Emphasis ours (171-2).

At another juncture the Court further noted:

> ". . . the government is having a lot of trouble showing a threat in this case." (174)

"There was no articulated threat in this case" (174).

With respect to the tape recording (discussed further *infra*), the Court aptly noted:

> ". . . Horowitz was given careful instructions as to what he should say to DeLutro. That *was a coached conversation."* (175)

Reasons For Granting Certiorari

POINT I

The statute herein involved, 18 U.S.C. § 1894 (Federal Loansharking Statute) is unconstitutional in that it requires no determination of an affect on interstate commerce and is in conflict with the bankruptcy laws. Moreover, in *Perez v. United States,* this court has already granted certiorari in a case presenting the same issue as herein, and thus, for the same reasons, certiorari should be granted in the case at bar, too.

No extended discussion of this point is required. This Court has already considered the issue of the constitutionality of the Loansharking statute and has granted certiorari in the case of *Perez* v. *United States, supra,* on November 13, 1970.

At least for the grounds already established by the *Perez* case, we submit that certiorari should be granted herein as well.

There can be no dispute about the fact that the statutory issue is clearly raised in the record and that the courts below decided against attempts to have it declared unconstitutional. We respectfully submit therefore, that this case should be retained for probable jurisdiction and certiorari should be granted because of the *Perez* case which is virtually on "all fours" with that herein.

We call this court's attention to Judge Hays' cogent dissent in *Perez, supra,* in the Circuit Court.

The Circuit Court in the second circuit, per a different bench, seems to have decided contrary to the *Perez* case anyway in a gun charge indictment, *United States* v. *Bass,* F2d (2 Cir. 11/30/70).

Therefore, for the foregoing reasons, the Petitioner should succeed in seeking Certiorari as his case is virtually identical to the issue in *Perez* v. *United States, supra.*

POINT II

The prosecution conceded that without petitioner's knowledge or consent, it planted an electronic listening device in the office of the alleged victim, L. B. Horowitz, and surreptitiously recorded the conversation between petitioner and Horowitz. This tape was the only direct evidence against petitioner since Horowitz denied that he was ever intimidated or put in fear by DeLutro, but that on the contrary looked upon petitioner as a friend.

A—The court permitted the F.B.I. agents to testify by way of impeachment that the government's only witness, Horowitz, was lying. Thus, since the tape is unsworn, there was no sworn evidence in chief at all and no *corpus delecti* was established.

This is a strange case indeed since the only alleged victim herein, L. B. Horowitz, stated unequivocally, that he had never been put in fear and that no crime was ever committed by petitioner.

1. The Court below has recognized that the *only evidence* against DeLutro stemmed from the impeachment of the government's own complainant, L. B. Horowitz, by three

F.B.I. agents. The tape recording was also introduced, but since L. B. Horowitz denied it intimidated him and it contained no actual threat, it alone was insufficient. (". . . the evidence was hardly overwhelming"—Slip Opinion, 770.)

To the extent that the Circuit Court and district Bench indicated that "impeaching" testimony can be used as proof of actual guilt, it is submitted that it seems to be at war with the rules of evidence and portends much mischief in the prosecution of crime since in effect it means that a person can be convicted without any evidence-in-chief and without any "victim" or "*corpus delecti*" being established.

A hearsay conviction is anathema. No conviction can rest on impeaching testimony.

> *United States* v. *Arcuri,* 405 F.2d 691 (2 Cir. 1968); aff'g F. Supp. 337 (E.D.N.Y. 1968);
> *United States* v. *Miles,* 413 F.2d 34, 37, 38 (3 Cir. 1969);
> *Culwell* v. *United States,* 194 F.2d 808 (5 Cir.).

The rules of evidence cannot be dispensed with. A fair trial must be afforded (*Snyder* v. *Massachusetts,* 291 U.S. 97; *Winters* v. *New York,* 333 U.S. 507, and *Powell* v. *Alabama,* 287 U.S. 45).

A hearsay conviction therefore, must not be permitted to stand. See, *United States* v. *Arcuri,* 405 F.2d 691 (2 Cir. 1968), aff'g. 282 F. Supp. 337 (E.D.N.Y. 1968).

The rule is clear that where the Court even permits impeachment of a party's own witness (which is only rarely permitted altogether), the impeachment may not be used for anything other than that. In other words, it must be made manifest to the jury that the impeaching hearsay

evidence cannot be considered on the issue of guilt or innocence *per se,* but only with respect to the credibility of the witness whose credibility is being challenged.*

In *United States* v. *Miles* (3 Cir. 1969), 413 F. 2d 34, 37, 38 the Court explained:

> "The United States may properly claim surprise and impeach its own witness by use of an out-of-court statement where (1) the witness' testimony was contrary to that which had been anticipated and (2) where the testimony was actually injurious to the Government's case. Bushaw v. United States, 353 F. 2d 477 (9th Cir. 1965) cert. den., 384 U.S. 921, 86 S. Ct. 1371, 16 L. Ed. 2d 441 (1966), 1 Underhill's Criminal Evidence, Chapter 21, § 232, 1968 Supplement. However, the impeachment examination must be reasonably calculated to rehabilitate the Government's case *without unnecessarily prejudicing the defendants.* Culwell v. United States, 194 F. 2d 808 (5th Cir. 1946). In making these determinations, the district court quite naturally exercises a certain amount of discretion." . . .

The Court further observed:

> "If we assume the propriety of some impeachment examination, the facts here in any event did not justify the Assistant United States Attorney's reading the prior statement line by line in the presence of the jury. United States v. Block, 88 F. 2d 618 (2nd Cir. 1937). The examination, as it was conducted, was hardly designed to undo whatever affirmative harm had been done without unreasonably prejudicing the defendants. *On the contrary, it appears to have been calculated to affirmatively aid the Government in establishing appellants' guilt.* Further, we are unable to say that the court's cautionary instruc-

> tion, to consider the statement as impeachment material only, adequately dispelled the prejudicial effect of the Government's line-by-line reading of the statement." (Emphasis ours)

In the case at bar, there was no prior "written" or "sworn" testimony of this witness, since it is manifest that he could not have testified in the Grand Jury, else he would have certainly have been confronted by that testimony. (*United States* v. *Youngblood,* 379 F. 2d 365 (2 Cir. 1967.))

The authorities are in agreement that where hearsay impeachment is even allowed, it must never be permitted to be considered as affirmative evidence in aid of a conviction.

In *Culwell* v. *United States* (5 Cir.) 194 F. 2d 808, the Court aptly explained the rule that must be applied (id at 811):

> "It is the established rule that impeachment of one's own witness may be resorted to where his testimony has surprised the party offering him. However, the impeaching matter is to be limited to the point of surprise and even where there is a real surprise it is not proper to permit the impeachment testimony to go beyond *the only purpose* for which it is admissible, i. e., the removal of the damage the surprise has caused. "In no event may the fact that a witness has made contradictory statements be used as it in effect was here, as a basis for completely discarding the rules of evidence against hearsay and ex parte statements, and, as impeachment, opening the flood gates of prejudicial and damaging hearsay." Young v. United States, 5 Cir., 97 F. 2d 200, 206. Moreover, the damage claimed must not have been self-inflicted

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* See 345 and 357 of appendix. The Court did not make it sufficiently clear that the evidence of the F.B.I., even if believed was insufficient to convict.

by continuing, as here, to put in damaging statements after the witness' hostility has been discovered.*

"In Kuhn v. United States, 9 Cir., 24 F. 2d 910, the procedure followed by the district attorney was quite similar to that pursued by the government attorney in the case at bar and the court rightly condemned the procedure as improper. As we pointed out in Young v. United States, supra, "* * * it is ordinarily the best practice, if it can be effectively done, when a party shows that he has been surprised by the adverse testimony of a witness he has offered, to permit him to withdraw the witness and the testimony from the jury by having the whole evidence stricken from the record, as was done in Kuhn v. United States, 9 Cir., 24 F. 2d 910."

See:

Kuhn v. *United States,* (9 Cir.), 24 F. 2d 910.

See, also:

Southern Railway v. *Gray,* 241 U.S. 333, 337.

The Court, examining a similar situation to the case herein found error, proclaiming (194 F. 2d at 811):

"If, on the contrary, the court does not follow this course, it may in the exercise of its discretion permit the witness' testimony to remain in the record for such weight as it may have in the light of its impeachment provided it limits the impeaching evidence to the point of surprise and *provided further that it carefully instructs the jury that the impeaching evidence is not admitted as evidence in the offeror's favor but merely to destroy the credit of the witness,* to remove the damage caused by the surprise. Here,

* L. B. Horowitz was not a hostile witness.

> at the time that this *mass of hearsay* evidence was received and had its impact on the jury, *the Court did not caution the jury that the contradictory statements could have no legal tendency to establish the truth of their subject-matter.* Southern Railway v. Gray, 241 U.S. 333, 337, 36 S. Ct. 558, 60 L.Ed. 1030. Nor was this omission cured by the court's charge, which fell far short of compliance with the careful instruction demanded by the authorities." (Emphasis ours.)

Even in State courts, the rule is the same.

See,

> *Green* v. *State* (Md. 1966), 220 A.2d 544, 546, 243 Md. 154.

See, also,

> *State* v. *Saporen,* 205 Minn. 358, 285 N.W. 898 (1939).

Over three decades ago, Judge Learned Hand of this Court made it abundantly clear that irrespective of whether or not the hearsay rule was popular or not, and without regard to what the law ought to be, writing for the Court he held that no conviction may be predicated upon hearsay (*United States* v. *Block,* 88 F. 2d 618, 620) (2 Cir. 1937).

There Judge Hand explained (id. at 620):

> "The judge's charge mended nothing; he left the jury to disentangle in their minds the innocuous part which the witness had conceded, from the great bulk which he had disaffirmed. The hearsay remained as effective as before, and really the prejudice was incurable anyway, whatever he might have said. *Perhaps the rule against hearsay ought to be discretion-*

> *ary,* dependent upon how far the party against whom it is used has effective protection. In a case like this for instance, there seems to be no good reason why the prosecution should be held to what it can extract from such a witness on the stand; he confronts the accused, and if he retracts, the accused gets whatever benefit that may be. In other affairs such a statement would be accepted as evidence to be weighed against the retraction, and nobody would think it an injustice to make use of it. *But we are not free so to make over the law; we cannot sustain a conviction based upon unsworn evidence."*

Yet in the case at bar, the conviction is based upon unsworn hearsay. The equivocal tape recording is hearsay. The testimony of the F.B.I. agents seeking to impeach Horowitz is sheer hearsay and the Court below did not make it clear enough that in no event could the jury convict on their testimony as to the credibility of Horowitz.

So far as the electronic surveillance is concerned, it is obvious that since this Court has already granted Certiorari in *White* v. *United States,* 405 F.2d 838 (7 Cir.), cert. granted, 394 U.S. 957 (1969), that for similar reasons certiorari should be granted herein.

In the case at bar, the only evidence that was offered to incriminate the Petitioner was a surreptitious tape recording made sans court order and without the real consent of the alleged victim, L. B. Horowitz, who said that he was approached by the F.B.I. despite the fact that he never made any complaint and never asked for any protection. cf: *Kaufer* v. *United States,* 394 U.S. 458 (406 F.2d 550, 2 Cir.).

The alleged victim, Horowitz, had said that he was a friend of DeLutro and could get credit only from him. He denied that he was ever intimidated by DeLutro and that the "four letter" words used by him were not deemed "threats" by him since that is the way DeLutro, with his limited vocabulary, always spoke.

The virulence of the tape is incalculable, since it alone was used to convict. The Courts below, however, permitted the "impeachment" of Horowitz by the F.B.I. as "evidence in chief" which was incorrect. The tape was unsworn and thus no "sworn" testimony existed "in chief" to prove guilt.

For the reason, too, that this is in reality an attempt to extend the "hearsay" rule of *Costello* v. *United States,* 350 U.S. 359, reh. denied, 351 U.S. 904, to trials as well as indictments, this Court should grant certiorari to clarify the issue.

In essence this is a hearsay conviction.

CONCLUSION

The petition for a writ of certiorari to the United States Court of Appeals, Second Circuit, should be granted.

Respectfully submitted:

IRVING ANOLIK
Attorney for Petitioner, DeLutro

APPENDIX

Opinion of United States Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 214—September Term, 1970.

(Argued October 23, 1970 Decided December 11, 1970.)

Docket No. 34987

UNITED STATES OF AMERICA,

Appellee,

—against—

CATALDO CALEGRO DELUTRO,

Defendant-Appellant.

Before:

WATERMAN, HAYS and FEINBERG,

Circuit Judges.

Appeal from conviction of violating the federal loan-sharking statute, 18 U.S.C. §894, and the Hobbs Act, 18 U.S.C. §1951, after a jury trial before Edmund L. Palmieri, *J.*, in the United States District Court for the Southern District of New York. Affirmed.

IRVING ANOLIK, New York, N.Y., *for Defendant-Appellant.*

EDWARD M. SHAW, Assistant United States Attorney (Whitney North Seymour, Jr., United States Attorney for the Southern District of New York, Jack Kaplan, Assistant United States Attorney, on the brief), *for Appellee.*

Appendix—Opinion of United States Court of Appeals

FEINBERG, *Circuit Judge*:

Cataldo Calegro DeLutro appeals from a judgment of conviction of violating the federal loansharking statute, 18 U.S.C. §894, and the Hobbs Act, 18 U.S.C. §1951. After a jury trial in the United States District Court for the Southern District of New York before Edmund L. Palmieri, *J.*, appellant received concurrent eight year sentences and a $10,000 fine on each count. The only issue on appeal that requires extended discussion is whether conviction under the anti-extortion statutes cited above is barred if the victim denies at trial that any threats were made or that he was ever put in fear.

According to the facts, as the jury could have found them, that issue arises in the following context. DeLutro, a money lender, loaned one Leonard Horowitz a total of $42,000 in cash over a seven month period ending in the spring of 1969. Horowitz, an 80-year old New Yorker, needed the money for his failing fur business. The money was loaned at interest of four per cent a week, or 208 per cent per year.

In early May 1969, FBI agents questioned Leonard Horowitz and his brother Max about their relationship with DeLutro and obtained permission to install listening equipment at their business office to record a meeting with DeLutro. On May 12, Leonard Horowitz informed DeLutro's messenger that he was unable to make his full weekly payment. Predictably, this brought DeLutro over later that day to collect. A lengthy interchange ensued, first with Leonard alone and then with both brothers present. The entire conversation was recorded, and was watched by an FBI agent hidden a few feet away.

At trial, the Government played the tape of the conversation for the jury, and the FBI agent who saw the entire encounter testified as to defendant's physical actions. Leonard Horowitz was called to testify to the making of the loan and the accuracy of the May 12 recording, which he did. On cross-examination, however, Horowitz stated that DeLutro did not threaten him in the May 12 conversation and that he had not been fearful that violence would be used against him. He also agreed with defense counsel that his past relationship with DeLutro had been "cordial." Judge Palmieri thereafter permitted the Government to question Horowitz further on his state of mind at the time of the May 12 incident, since that door had been thrown wide open. Horowitz then denied that, when shown a picture of DeLutro, he had told FBI agents that DeLutro was "vicious" and that he (Horowitz) "could get killed" and that he had met DeLutro once without telling the FBI because he was afraid for his life and the lives of his family. Two FBI agents then testified that Leonard Horowitz had made precisely those statements to them in May 1969.[1]

Appellant claims that the evidence was insufficient as a matter of law because "some testimony-in-chief from a victim was essential to prove the *corpus delicti* of the crime, namely, the 'use of extortionate means.' "[2] Appellant has correctly singled out the key element in the case. Thus, Judge Palmieri charged the jury that the real issue was whether appellant had used "extortionate means" in collecting a payment due on the outstanting loan. The term,

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[1] A third agent also testified as to what Horowitz said on that occasion.

[2] Brief for Appellant at 6.

which appears in section 894 of Title 18, is defined in section 891(7) as

> any means which involves the use, or an express or implicit threat of use, of violence or other criminal means to cause harm to the person, reputation, or property of any person.

However, we do not agree that the only way of proving that there was "an . . . implicit threat . . . of violence" was by the testimony at trial of Leonard Horowitz. If that were so, then the purpose of the statute could easily be nullified by terrorizing the victim. However, this does not relieve the Government of the necessity of proving its case. Obviously, it must still present legally admissible evidence that the prohibited threats were made. But it did that here. Except for the constitutional point briefly discussed below, the recording of the conversation between DeLutro and Leonard and then Max Horowitz was clearly admissible in evidence.[3] So was the testimony of Agent Seneff, who observed Horowitz's actions and demeanor. While the evidence was hardly overwhelming, together this was enough for the jury to have found that DeLutro impliedly threatened Leonard Horowitz with violence if the debt were not paid. Naturally, the testimony of Horowitz at trial that he was not threatened detracted from the Government's case. Indeed, the trial judge properly charged the jury that if it believed that testimony, it should acquit. But the jury was not required to credit that testimony and

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[3] What DeLutro said on May 12, 1969 was not offered for its truth, but because his words were the very crime charged. Therefore, his statements were not hearsay; even if they were, defendant's statements would be admissible. J. Wigmore, Evidence §§1048, 1770 (3d ed. 1940).

in judging the credibiliity of Horowitz on that point, it could take into account, as the judge correctly told it to, the contradictory statements of Horowitz to the FBI in May 1969. The jury apparently concluded that Horowitz was sufficiently scared at trial to deny his terror in the past. Each juror obviously used his common sense, a frequent occurrence with the jury system. We should do no less, and we reject the notion that the silencing of a victim at trial can absolutely eliminate the possibilitiy of a conviction.

While appellant has a number of other arguments, none requires more than a brief discussion. The attacks on the constitutionality of 18 U.S.C. §894 are precluded by our decisions in *United States* v. *Perez,* 426 F.2d 1073 (2d Cir.), cert. granted, 39 U.S.L.W. 3214 (U.S. Nov. 13, 1970), and *United States* v. *DeStafano,* 429 F.2d 344 (2d Cir. 1970). Appellant claims that the recording of May 12, 1969 was inadmissible because it violated his fourth amendment rights. The argument has been rejected by this court a number of times, e.g., *United States* v. *Campbell,* 426 F.2d 547, 553 (2d Cir. 1970); *United States* v. *Kaufer,* 406 F.2d 550 (2d Cir.), aff'd, 394 U.S. 458 (1969), although we note that the issue is pending in the Supreme Court in *United States* v. *White,* 405 F.2d 838 (7th Cir.), cert. granted, 394 U.S. 957 (1969), argued October 20, 1970, 39 U.S.L.W. 3179. Appellant also claims that he was entrapped. The argument was not made below and, in any event, is not persuasive on the merits. In addition, appellant complains of Judge Palmieri's refusal to charge that the Government's failure to call Max Horowitz as a witness justified an inference unfavorable to the Government. However, since

Max was fully available to the defense, there was no error. Finally, we have considered appellant's other arguments and find them without merit.

Judgment affirmed.

Order of the United States Court of Appeals Denying Petition for Rehearing

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

34987

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

CATALDO CALEGRO DELUTRO, a/k/a CHARLES DELUTRO, a/k/a CHARLES WEST, and STANLEY LOREN, a/k/a SONNY LOREN,

Defendants,

CATALDO CALEGRO DELUTRO,

Defendant-Appellant.

A petition for a rehearing together with a motion in the alternative to stay the issuance of the mandate and for bail pending application for a writ of certiorari to the Supreme Court of the United States having been filed herein by counsel for the appellant, Cataldo Calegro DeLutro.

Upon consideration thereof, it is

Ordered that

1. The petition to stay the issuance of the mandate is granted subject to the provisions of FRAP 41(b).

2. The petition in all other respects is denied.

PAUL R. HAYS

WILFRED FEINBERG

Circuit Judges

January 5, 1971

Order of the United States Court of Appeals Denying Rehearing En Banc

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

34987

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

CATALDO CALEGRO DELUTRO, a/k/a CHARLES DELUTRO, a/k/a CHARLES WEST, and STANLEY LOREN, a/k/a SONNY LOREN,

Defendants,

CATALDO CALEGRO DELUTRO,

Defendant-Appellant.

A petition for a rehearing containing a suggestion that the action be reheard en banc having been filed herein by counsel for the appellant, Cataldo Calegro DeLutro, and no active circuit judge having requested that a vote be taken on said suggestion.

Upon consideration thereof, it is

Ordered that said petition be and it hereby is denied.

J. EDWARD LUMBARD
Chief Judge

January 5, 1971

In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 1234

CATALDO CALEGRO DELUTRO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES

After a jury trial in the United States District Court for the Southern District of New York, petitioner was convicted of collecting extensions of credit by extortionate means, in violation of 18U.S.C. (Supp. V) 894, and interfering with interstate commerce by extortion in violation of the Hobbs Act, 18 U.S.C. 1951. On May 1, 1970 he was sentenced to concurrent prison terms of eight years and a $10,000 fine on each count. The court of appeals affirmed (Pet. App. 1a-6a).

The evidence is summarized in the opinion of the court below (Pet. App. 2a-3a). In essence it shows

that petitioner loaned $42,000, at the rate of four per cent a week, to two New York brothers who were engaged in the fur business. In early May of 1969, the victims were contacted by agents of the F.B.I. who requested and obtained permission from them to install listening devices in their business office for the purpose of recording their conversations with petitioner. On May 12, upon the suggestion of the F.B.I. agents, one of the brothers, Leonard Horowitz, advised petitioner that he was unable to make his weekly payment. Later that day petitioner arrived at the brothers' office. The lengthy conversation that ensued was recorded and subsequently introduced in evidence.

At trial, Leonard Horowitz testified to making the loan and to the accuracy of the recorded conversation. On cross-examination, however, he denied that petitioner had threatened him and indicated that his relations with petitioner had been "cordial." The government then put on F.B.I. agents who testified that Horowitz had told them in May 1969 that petitioner was "vicious" and that he was afraid of petitioner both for his own life and for the lives of his family.

Petitioner contends that his conviction for violating 18 U.S.C. 894(a) should be reversed because that statute is unconstitutional. The question is pending before this Court in *Perez* v. *United States*, No. 600 this Term, certiorari granted, November 16, 1970.[1]

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[1] We note that all three circuits that have considered the constitutionality of 18 U.S.C. 894(a) have upheld it. See *United States* v. *Perez*, *supra*, 426 F. 2d 1073 (C.A. 2); *United States* v. *Fiore*, No. 7646 (C.A. 1), decided December 4, 1970,

Petitioner also contends that introduction of the tape recording of his conversation with the brothers was unlawful, because (a) the recording violated his Fourth Amendment rights and (b) it was hearsay. The latter claim is, as the court below held, insubstantial. The recording was not introduced for its truth but to show that petitioner had made the statements. It was thus clearly not hearsay. The argument that the recording of the conversation, with Leonard Horowitz' consent, violated petitioner's Fourth Amendment rights may well be resolved by *United States* v. *White*, No. 13, this Term, certiorari granted, 394 U.S. 957, argued October 20, 1970.[2]

In view of these circumstances, it would seem appropriate to defer disposition of the instant case until after *Perez* and *White* are decided.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

FEBRUARY 1971.

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petition for a writ of certiorari pending, No. 1259, this Term; *United States* v. *Biancofiori*, 422 F. 2d 584 (C.A. 7), certiorari denied, 398 U.S. 942.

[2] The recording in this case took place after the decision in *Katz* v. *United States*, 389 U.S. 347, unlike that in *White*.

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